

CASE 1:07-CV-00035-RJA-HKS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD JAMES ANSON

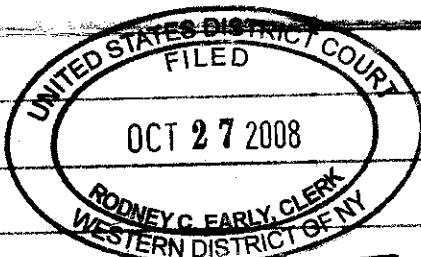
PLAINTIFF

v.

07-CV-0035

UNITED STATES OF AMERICA

DEFENDANT



NOTICE OF MOTION AND MOTION FOR THE
REQUEST FOR APPOINTMENT OF COUNSEL

PLEASE TAKE NOTICE THAT DONALD JAMES ANSON,
THE PLAINTIFF, HEREBY MOVES FOR THE APPOINTMENT
OF COUNSEL, UNDER 28 U.S.C.A. § 1915, FOR THE
ABOVE CAPTIONED CASE, BASED ON THE FACTS AND
REASONS PRESENTED IN THE ATTACHED BRIEF.

CASE 1:07-CV-00035-RJA-HKS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Donald James Anson

PLAINTIFF

07-CV-0035

v.

UNITED STATES OF AMERICA

MOTION FOR APPOINTMENT OF COUNSEL
— BRIEF —

THE PLAINTIFF, DONALD JAMES ANSON, RESPECTFULLY ASKS, MOVES, THE COURT TO CONSIDER THE APPOINTMENT OF COUNSEL UNDER 28 U.S.C.A. § 1915.

WHILE THE PLAINTIFF UNDERSTANDS THAT SUCH AN APPOINTMENT, IN A CIVIL CASE SUCH AS THIS, IS NOT A 'RIGHT' BUT IS DONE SO ONLY AT THE DISCRETION OF THE COURT, PLAINTIFF OFFERS THE FOLLOWING FACTS AND REASONS FOR THE COURTS CONSIDERATION.

THE PLAINTIFF WOULD ASK THE COURT TO MAKE ITS DECISION WITH THE CASE OF HODGE V. POLICE OFFICER 802 F.2d 58 (2nd Cir. 1986) IN MIND.

HODGE STATED, "A COURT MUST EXERCISE ITS DISCRETION WITH SOUND LEGAL PRINCIPLES... SEE ALBEMARLE PAPER CO. V MOODY, 422 U.S. 405, 416, 95 S.Ct 2362, 2370, 45 L.Ed.2d 280 (1975); JENKINS V. CHEMICAL BANK, 721 F.2d 876, 879 (1983).

FOLLOWING CRITERION;

- ① "AS A THRESHOLD MATTER ... THE DISTRICT COURT MUST CONSIDER THE MERITS OF THE INDIGENT'S CLAIM" 650 F.2d at 887 CITING MILLER V PLEASURE 296 F.2d 283 HODGE AT 60.

IN THE PRESENT CASE, PLAINTIFF CLAIMED THAT CERTAIN ACTIONS AND ORDERS GIVEN BY ~~THE~~ U.S. MARSHALS CAUSED PLAINTIFF TO FALL AND INJURE HIMSELF, ^{DOC. 21} ~~SEE COMPLAINT~~ ^{AMENDED COMPLAINT} THUS BRINGING THIS ACTION. (SEE ~~COMPLAINT~~) THE DEFENDANTS, THOUGH THEY HAVE FILED A MOTION TO DISMISS (DOC 23) HAVE NOT CHALLENGED THE FACTS AS STATED IN THE COMPLAINT AS TO THE CAUSE OF THE INJURY, NOR THE EXISTANCE OF THE INJURY. INSTEAD THEY SAY ACTIONS, AS STATED IN THE COMPLAINT, WERE NOT ACTIONABLE DUE TO THE 'DISCRETIONARY FUNCTION EXCEPTION' (28 U.S.C. § 2680(a)), AN AFFIRMATE DEFENSE.

TO GO BEYOND THE INFORMATION CONTAINED IN THE COMPLAINT WOULD BRING THE ISSUE TO THE SECOND CRITERION (SEE BELOW)

- ② "ONE SUCH CONSIDERATION IS THE NATURE OF THE FACTUAL ISSUES THE CASE CLAIM PRESENTS" HODGE AT 61, OFFERING "AN INDIGENT PRISONER [SUCH AS PLAINTIFF] BRINGING SUCH A CASE WOULD BE UNABLE TO CONDUCT THE INVESTIGATION; THESE CIRCUMSTANCES WOULD MILITATE TOWARD APPOINTING COUNSEL." MARLIN 650 F.2d at 887 (CITE PETITIONER)

ALL REQUESTS TO THE U.S. MARSHAL'S OFFICE(S)
HAVE BEEN IGNORED.

"THE MACLIN COURT ALSO FELT THAT IF A CASE'S
FACTUAL ISSUES TURN ON CREDIBILITY, THIS SHOULD
WEIGH ON THE SIDE OF APPOINTING COUNSEL SINCE
'IT IS MORE LIKELY THAT THE TRUTH WILL BE EXPOSED
WHERE BOTH SIDES ARE REPRESENTED BY THOSE
TRAINED IN PRESENTATION OF EVIDENCE AND IN CROSS-
EXAMINATION' 650 F.2d AT 888 CITING MANNING V.
LOCKHART 623 F.2d 536 (8TH CIR 1980)" HODGE AT 61.

THE INSTANT CASE MAY WELL INVOLVE THE
TYPE OF MEDICAL TESTIMONY THAT WOULD NEED
AN EXPERIENCED ATTORNEY TO PRESENT AND DIRECT.

(3) THE THIRD FACTOR "CITED BY THE MACLIN COURT IS
THE PLAINTIFF'S APPARENT ABILITY TO PRESENT THE
CASE 650 F.2d AT 888 AS ARTICULATED IN GORDON V.
LEEKE, 574 F.2d 1147 (4TH CIR 1978).

I AM TOTALLY NEW TO THIS PROCEDURE.

(4) THE FINAL FACTOR FROM THE MACLIN COURT WAS
"... FOR OBVIOUS REASONS, THAT THE TRIAL JUDGE SHOULD
BE MORE INCLINED TO APPOINT COUNSEL IF THE
LEGAL ISSUES ARE COMPLEX. 650 F.2d AT 888-89"
HODGE AT 61.

TO THE PLAINTIFF, EVEN THE ISSUE OF THE
DISCRETIONARY FUNCTION EXCEPTION IS COMPLEX AND
DIFFICULT TO UNDERSTAND.

LASTLY PLAINTIFF WOULD ASK THE COURT TO
CONSIDER WOULD BE THE FACT THAT NOT ONLY

ALL REQUESTS TO THE U.S. MARSHAL'S OFFICE(S)
HAVE BEEN IGNORED.

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FACTUAL ISSUES TURN ON CREDIBILITY, THIS SHOULD
WEIGH ON THE SIDE OF APPOINTING COUNSEL SINCE
'IT IS MORE LIKELY THAT THE TRUTH WILL BE EXPOSED
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HODGE AT 61.

TO THE PLAINTIFF, EVEN THE ISSUE OF THE
DISCRETIONARY FUNCTION EXCEPTION IS COMPLEX AND
DIFFICULT TO UNDERSTAND.

LASTLY PLAINTIFF WOULD ASK THE COURT TO
REOPEN THE PLAINTIFF'S CASE

CERTIFICATE OF SERVICE

I certify that on Oct. 23rd, 2008, I mailed a copy of this brief and all attachments via first class mail, to the following parties at the address(s) listed below: (.84)

CLERK OF THE COURT
U.S. FEDERAL COURTHOUSE
68 COURT STREET
BUFFALO, NEW YORK 14202

TERRANCE FLYNN/CHRISTOPHER TAFFE
UNITED STATES ATTORNEY
620 FEDERAL BUILDING
100 STATE STREET
ROCHESTER, NEW YORK 14614

PROOF OF SERVICE FOR INSTITUTIONALIZED OR
INCARCERATED LITIGANTS

I certify that this document was given to MAIL BOX prison officials on this 23rd day of Oct., 2008, for forwarding to the U.S. DISTRICT Court for the WESTERN DISTRICT OF NEW YORK. I certify under the penalty of perjury that the foregoing is true and correct. 28 U.S.C. §1746.

Dated this 23rd day of Oct., 2008.

Donald J. Flynn
(Signature)

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